

**Avalon-Carver Community Center and Lloyd Taylor.**  
Case 21-CA-17891

April 17, 1981

**DECISION AND ORDER**

On August 27, 1980, Administrative Law Judge Roger B. Holmes issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that the Respondent, Avalon-Carver Community Center, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We have further considered Respondent's contention that the Administrative Law Judge has evidenced a cultural bias and insensitivity towards Respondent. We have considered the record and the attached Decision and reject these charges.

Respondent also contends that the General Counsel's investigation of the Charging Party's complaint was conducted in a superficial manner and that the General Counsel was biased in favor of the Charging Party. However, there is no evidence on the record of any impropriety or unfairness on the part of the General Counsel. Therefore, we find no merit in these contentions.

<sup>2</sup> We agree with the Administrative Law Judge that Lloyd Taylor was engaged in protected concerted activities when, on behalf of his fellow employees, he prepared and presented to Respondent a grievance criticizing the performance of Supervisor Florine Johnson. The grievance itself clearly reveals the employees' concerns over their working conditions and the impact of their supervisor on those working conditions.

**DECISION**

**STATEMENT OF THE CASE**

ROGER B. HOLMES, Administrative Law Judge: The unfair labor practice charge in this case was filed on June 8, 1979, by Lloyd Taylor, an individual. (See G.C. Exh. 1(a).)

The Regional Director for Region 21 of the National Labor Relations Board, herein called the Board, who was acting on behalf of the General Counsel of the Board, issued on September 14, 1979, a complaint and notice of hearing against Avalon-Carver Community

Center, herein called the Respondent. (See G.C. Exh. 1(c).)

The General Counsel's complaint alleges that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act. In summary, the General Counsel contends that the Respondent discharged employee Taylor on April 26, 1979, because Taylor had engaged in protected concerted activities with other employees in presenting a grievance regarding a supervisor.

The Respondent filed answers to the General Counsel's complaint, and, among other things, denied that it had committed the alleged unfair labor practices. (See G.C. Exhs. 1(e) and 1(h).) In summary, the Respondent contends that there was reasonable and sufficient cause to terminate employee Taylor because of his poor work performance and his attitude. The Respondent further contends that Taylor's termination was effected consistently with the Respondent's personnel policy and practice.

The hearing in this case was held before me on February 4 and 5, 1980, in Los Angeles, California. Both counsel for the General Counsel and the representative of the Respondent prepared and filed briefs which were persuasively argued from their respective points of view. Both briefs were timely received by the due date of March 11, 1980.

In addition, counsel for the General Counsel filed a motion to correct the transcript. The motion was not opposed, and it is hereby granted so that the transcript of the proceedings is corrected in the manner indicated in the motion.

**FINDINGS OF FACT**

**The Witnesses**

In alphabetical order by their last names, the following seven persons appeared as witnesses at the hearing in this proceeding:

*Mary B. Henry* is the executive director of the Avalon-Carver Community Center. She began her work at Avalon-Carver in 1964 as a tutorial coordinator. She next became a group worker and later a VISTA volunteer supervisor. In 1969 Henry was named to the position of executive director of the Respondent. She has served the community in that position since that time.

*Florine Johnson* is the coordinator for the Diamond Head Tutorial Project of the Respondent. Johnson had held that position for approximately 16 months at the time of the hearing.

*Beverly Kneese* was employed by the Respondent as an education specialist at the time that she testified at the hearing. She has worked as a tutor at the Diamond Head Tutorial Project since February 1979.

*Thomas McLurkin* is the principal of the Holmes Avenue School of the Los Angeles City School District. He has held that position since 1968. McLurkin has worked in various teaching positions for the Los Angeles City School District for the past 30 years. He has also been a member of the board of directors of the Respondent for about 8 or 9 years. He has served on the person-

nel committee, the membership committee, the nominating committee, and other committees of the Avalon-Carver Community Center.

*Patricia Ann Mosby* has worked since March 20, 1979, as an education specialist for the Respondent. She was working in that position at the time that she gave her testimony at the hearing in this proceeding. She has worked in the Diamond Head Tutorial Project under the supervision of Johnson.

*Lloyd Earl Taylor* is the Charging Party and the alleged discriminatee in this proceeding. Taylor worked for the Respondent as an education specialist from September 1978 until he was terminated on April 26, 1979.

*William A. Whittaker* was employed by the Respondent from October 1977 to October 1979. Whittaker held the position of project director of the CETA Title 6 Program.

#### Credibility Resolutions

Because of the numerous conflicts among the witnesses in relating their versions of the events which are in issue in this case, it is necessary to make a decision as to which one of the versions is credible. In making the credibility determinations herein, I have based those determinations on the demeanor of the witnesses while they were on the stand, and I have been guided by the criteria summarized by the Board in its decision in *Northridge Knitting Mills, Inc.*, 223 NLRB 230, 235 (1976). Of course, the positions occupied by the witnesses have been considered in assessing their identification with the parties to this proceeding and their possible interest in the outcome of the litigation.

Considering the employment status of both Kneece and Mosby at the time that they gave their testimony, I have also looked for guidance to the Board's decision in *Gold Standard Enterprises, Inc.*, 234 NLRB 618 (1978).

With all of the foregoing criteria in mind, I have found the testimony of Taylor, Kneece, Mosby, and McLurkin to be credible. I have concluded that these witnesses were relating the facts accurately and to the best of their ability to do so. In making the findings of fact to be set forth herein, I have relied extensively upon the testimony given by these witnesses. In addition, some of the findings of fact will be based upon documentary evidence which was introduced at the hearing in this proceeding.

The testimony given by Whittaker at the hearing conflicts significantly with statements made by Whittaker in his own pretrial affidavit. Note, for example, the denial by Whittaker at the hearing that he had told a person named West, who was a representative of the Employment Development Department of the State of California, that Taylor's grievance was "the straw that broke the camel's back." Yet, Whittaker's own affidavit states that Whittaker had made that statement. Whittaker's pretrial affidavit was dated June 14, 1979, and, thus, his affidavit was given at a point in time much closer to the time of Taylor's termination than was his testimony given at the hearing.

Note also Whittaker's inability to recall at the hearing that he had told the Employment Development Department agent that "Taylor was a disruptive force among

the staff," although Whittaker acknowledged that he had used that terminology before, and his own affidavit said that he had done so.

In addition, note the conflict between Whittaker's testimony at the hearing and the statement given in his pretrial affidavit regarding his discussion with Taylor at the time that Whittaker discharged Taylor. The statement in Whittaker's affidavit was: "After the meeting, I spoke with Taylor privately. I told him that I was aware of several complaints about his work performance, and that I did not appreciate what he was trying to do to the program and to Johnson by the filing of his complaint."

The foregoing examples illustrate why confidence in Whittaker's hearing testimony has been undermined by the conflicts between said testimony and his pretrial affidavit. In these circumstances, I have not credited nor relied upon the recital given by Whittaker at the hearing.

There are numerous significant conflicts between the testimony given by Taylor and the testimony given by Johnson. A decision must be made as to which one of the sharply differing accounts is credible since the two accounts are mutually inconsistent. For the reasons indicated above, I have found Taylor's testimony to be credible. Such a determination necessarily means that the contrary account offered by Johnson cannot be accepted. That conclusion has been reached notwithstanding Respondent's Exhibits 9 through 14. However, note, for example, that Respondent's Exhibit 9 does not purport to be a contemporaneously made account of the events as they allegedly took place. Instead, that exhibit is a rewritten version of the event made at a later date and based upon memory and such things as calendar notations. The files containing the original materials were broken into, and the documents were removed from the files by persons unknown. Therefore, Johnson had to reconstruct the events at a later date as she perceived those earlier events had occurred.

It is difficult to rationalize some of the differences in the accounts given by Taylor and by Henry at the hearing. Having now concluded that Taylor's account is credible, I cannot find a conflicting version to be reliable. Nevertheless, I have relied upon certain portions of the testimony given by Henry regarding the programs which are carried on by Avalon-Carver for the benefit of the community. Those facts will be summarized in sections 3 and 4 herein. See the Board's decision in *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053, fn. 1 (1979).

Henry, as the executive director, was especially knowledgeable and articulate in describing the programs which Avalon-Carver has undertaken in its years of service to the community. However, some other portions of her testimony cannot be accepted if Taylor's testimony is believed. Particularly unconvincing was the assertion that the final decision to terminate Taylor was made 2 weeks prior to the time that Taylor submitted the grievance to Johnson and to Whittaker, although the actual termination of Taylor was not carried out until after Taylor had submitted the grievance. Henry testified: "It was two weeks prior to the submission of his paper that I made the decision that he should not continue to work at Avalon-Carver Center."

The hiatus between what is alleged to be the final decision and the implementation of that decision was not satisfactorily explained in this version of the events. This is especially so because in this version it was not the first time, but instead the third time, that Taylor's termination had been discussed with Whittaker. According to this version, Whittaker had actively sought Taylor's termination on two earlier occasions. In that context, it was not convincingly explained in this version why the 2-week delay had occurred. The filing of the grievance by Taylor is left as a mere coincidence if this version is accepted. After considering the foregoing, I have decided not to credit this account.

#### The Respondent

Avalon-Carver Community Center has been in existence for 40 years in the south central area of Los Angeles. During that time it has been recognized for its service to the community and as an advocate for low-income persons in the community.

Some of the programs provided by the Respondent include: A narcotics program for young people, an alcoholism program for adults, tutorial projects, CETA programs, a youth employment program, and a youth training program. If the community perceives a need for other activities, Henry pointed out that Avalon-Carver would become an advocate for such additional programs.

It was admitted that the Respondent was, at all times material herein, a nonprofit California corporation. It has been engaged in the administration of social service programs, and it has operated a facility located at 3517 South Avalon Boulevard in Los Angeles, California.

During the 12 months which preceded the issuance of the General Counsel's complaint in this proceeding, the Respondent had gross revenues in excess of \$500,000. During the same period of time, the Respondent received grants of funds through the Comprehensive Employment and Training Act in excess of \$1 million indirectly from the United States Government.

After considering the foregoing, and the entire record in this case, I find that the Board would assert its jurisdiction over the operations of the Respondent. See the Board's decisions in the following cases: *Montgomery County Opportunity Board, Inc.*, 249 NLRB 880 (1980); *American and Indo-China Development a/k/a Project Aid*, 240 NLRB 743 (1979); *New York Chinatown Senior Citizens Coalition Center, Inc.*, 239 NLRB 614 (1978); *Community Services Planning Council/Area 4 Agency on Aging*, 243 NLRB 798 (1979); *Neighborhood Legal Services, Inc.*, 236 NLRB 1269 (1978); *Golden Day Schools, Inc.*, 236 NLRB 1292 (1978); *Young World, Inc.*, 216 NLRB 520 (1975); and *Legal Services for the Elderly Poor*, 236 NLRB 485 (1978).

In view of the foregoing, I find that the Respondent has been at all times material herein an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### The Employment of Taylor

Among the many programs of the Respondent is one which is known as the Diamond Head Tutorial Project.

Several years ago the Respondent obtained the use of a house in a low-income project so that the Respondent could provide services to the persons who lived in that community. The house had been given the name Diamond Head. It is located in the Pueblo Del Rio Housing Project, which is located near 52d Street and Holmes Avenue in Los Angeles. Nearby is the Holmes Avenue Elementary School. The official purpose of the Diamond Head Tutorial Project and a brief description of the work to be performed are set forth in Respondent's Exhibit 2, which is a form used by the United States Department of Labor.

Prior to his employment by the Respondent, Taylor had done private tutoring, and he had worked as a substitute teacher. Taylor was hired by Bill Whittaker, who was the project director of the CETA Title 6 program for the Respondent. Whittaker hired Taylor to work as a tutor in the Diamond Head Tutorial Project.

Bob Smith was the coordinator for the Diamond Head Tutorial Project when Taylor was first employed by the Respondent. Regarding Smith's performance as the coordinator, Taylor said that "there were complaints every day." Taylor said that Smith would sometimes arrive late at work. He estimated that it was about 10:30 or 11 a.m. when Smith arrived. The staff personnel would be locked out of the facility until the time of Smith's arrival. Then Smith would let the staff leave work around 2 or 2:30 p.m. Smith was replaced as coordinator of the Diamond Head Tutorial Project about the middle of October 1978 when Florine Johnson became the coordinator.

Henry believed Johnson to be highly qualified to supervise the project. Henry earlier had worked with Johnson in programs which were related to early childhood education. Henry had the opportunity to observe Johnson's work in those earlier years, and she knew that Johnson had received a degree from the University of Southern California.

The working hours at the Diamond Head Tutorial Project under Johnson were from 9 a.m. to 4:30 p.m. Also, Johnson moved part of the tutoring work to the nearby Holmes Avenue Elementary School. Taylor reported to the school between 9 a.m. and noon, and then he did tutoring work at the Diamond Head center in the afternoons. According to Taylor, it was suggested that lesson plans be prepared, but there was no definite requirement to do so. Taylor pointed out at the hearing that it was time consuming to prepare individual lesson plans for each student when a tutor had from 15 to 20 students.

From about the middle or end of October 1978 until February 1979, Taylor worked as a tutor in the classroom of Linda Adams.

Adams prepared an evaluation of Taylor's work in her classroom, and submitted her evaluation to Johnson. According to Taylor, Johnson did not believe the evaluation by Adams because Johnson "felt that I was one of her best workers as she'd always told me." Johnson permitted Taylor to read the evaluation which had been submitted by Adams. Taylor expressed his disagreement with the evaluation, and Johnson told Taylor that she was not going to use Adams' evaluation. Instead, John-

son stated that she was going to prepare her own evaluation of Taylor.

Johnson inquired whether Taylor wanted to continue to work with Adams. Taylor responded, "Well, if this is the way this teacher feels about me, I'd rather not work with her any longer." Johnson then stated that she would speak with the school principal, Thomas McLurkin, about transferring Taylor to another classroom.

McLurkin met with Johnson, Taylor, and Adams to discuss the problems concerning the evaluation of Taylor by Adams. (Resp. Exh. 7 is a copy of that evaluation.) At the meeting Taylor expressed his dissatisfaction with Adams' rating of him. McLurkin asked Adams to state her basis for her statements that Taylor was not punctual and needed to improve in terms of the management or organization in the classroom. McLurkin testified, "She said words to the effect that he needed to exhibit more initiative in the classroom."

After that meeting, McLurkin spoke separately with Johnson, who told McLurkin that "Mr. Taylor was upset over this particular situation." McLurkin felt that a change would improve the relationship between Taylor and school personnel. Because Carolyn Mayfield had no one to assist her in her classroom, a change was made in Taylor's assignment from Adams' classroom to Mayfield's classroom.

Nothing further was said to Taylor about his performance in Adams' classroom until Taylor's conversation with Whittaker on April 26, 1979. That conversation will be discussed later herein.

Taylor worked for Mayfield for about 10 days between February 16 and February 26, 1979. Mayfield's class was at the kindergarten level, and there was some confusion as to what Taylor could do as a tutor at that level. Accordingly, Mayfield expressed her view to Taylor that she wanted Johnson to explain to her what Taylor could and could not do. As a result, Mayfield did speak with Johnson regarding the matter. However, a few days later Mayfield once again told Taylor that she wanted to speak with Johnson.

On February 26, 1979, Johnson went to Mayfield's classroom to help Taylor in learning to function as a tutor at the kindergarten level. Taylor testified that Johnson "made a comment about how I howled at one little boy. I think I told him if he didn't stop it, I was going to knock him through the wall or something. She said that was inappropriate for me to talk to children like that in the classroom."

Johnson and Mayfield had another conversation on that day regarding Taylor. Afterwards, Johnson informed Taylor that Mayfield had rather quit her job than to have Taylor work in her classroom. Johnson arranged for Taylor's transfer to another classroom.

McLurkin said that Mayfield also complained to him regarding Taylor's "nonparticipation, insensitivity." McLurkin further testified, "She said words to the effect that Taylor did not want to play with the small boys and girls, participate in some of the physical activities that were required at her grade level, and that she found it difficult to communicate with Taylor, and she also talked about his attendance."

McLurkin acknowledged at the hearing that there were some teachers who also have problems in dealing with kindergarten level children, and therefore those teachers are assigned to teach at higher grade levels.

Taylor was next assigned to perform tutoring work in the classroom of Bobbi Montgomery. Montgomery taught at the fifth grade and sixth grade levels. Taylor continued to work in Montgomery's classroom until the time of his termination by the Respondent. Even after he was discharged, Taylor worked as a tutor without pay in Montgomery's classroom until the end of the school year. According to Taylor, Montgomery had "always given me an outstanding work performance."

In addition to the performance evaluation submitted by Adams, which has been discussed above, there was still another evaluation of Taylor by Johnson. Unfortunately, none of the parties had a copy of Johnson's evaluation by the time of the hearing. The parties stipulated that the second evaluation of Taylor had been lost, and it was not in the Respondent's possession at the time of the hearing. (See Jt. Exh. 1 regarding the disappearance of that document and other records in March 1979.)

Taylor had been given a copy of Johnson's evaluation of his work, but Taylor had left his copy in the Respondent's file cabinet drawer at the time of his termination. However, Taylor had read Johnson's evaluation of his work, and he recalled at the hearing that she had described his work as "average job performance."

An additional matter which was discussed by Taylor and Johnson regarding Taylor's work had occurred earlier when Taylor came in late to work 3 days in succession. Taylor went to Johnson, and he acknowledged to her that he was having a problem in getting to work on time. Taylor told her that he would work on the problem. Subsequently, Johnson commented to the staff personnel about the foregoing, and she told them that Taylor had become punctual after that.

At one point in time Taylor was late in submitting quarterly progress reports on each student. Johnson talked with Taylor about submitting his progress reports on time. Taylor also acknowledged that during one period of time he was late in making home visits with parents of the children for the purpose of reviewing their progress reports. Taylor estimated that this had occurred a couple of weeks prior to his termination. However, Taylor said that he was not told that the late home visits were a problem with his job performance. Nevertheless, he stated that he was told to accomplish his home visits.

According to Taylor, Johnson also told him that she was very impressed with his teaching of mathematics, and she suggested to Taylor that he pursue a career in the accounting field.

#### The Events During the Morning of April 23, 1979

There had been discussions previously among employees at the Diamond Head Tutorial Project about the way that Johnson was handling that program. Taylor said that such discussions had taken place "almost every day." However, it was on the morning of April 23, 1979, that a written grievance was first prepared.

As a result of conversations among Taylor and employees Louis Chuck Henry and Barbara McGhee while they were standing on the sidewalk next to the child care center, it was decided about 9:30 a.m. on April 23, 1979, that a written grievance should be prepared. Taylor undertook the preparation of the grievance. He had earlier been instructed to remain at the Diamond Head center that morning by Barbara Morris, an administrative assistant. Morris had told Taylor to be there because his station wagon would be needed that morning for the transportation of art products for an art show. While Taylor was waiting at the Diamond Head center for a telephone call from Morris, he prepared the written grievance.

After writing pages 2, 3, 4, 5, and 6 of the grievance, Taylor showed the document to employees Louis Chuck Henry, Barbara McGhee, and Beverly Kneece. This took place around noontime at the Diamond Head center. Taylor asked them if they had anything to add to the document, and he asked if they would sign the document. Henry replied that there were a couple of things which he wanted to talk about, but he said that he would sign the document after it was typed.

Kneece wrote the "Additional Comments" shown in the last paragraph of page 6 and also on page 7 of the document. Her signature appears on page 7. Kneece stated at the hearing that she did not agree with all of the things which Taylor had written. She explained that she had been an employee of the Respondent for about 8 weeks at that point in time. She testified, "I just wrote what I felt."

According to Taylor, the employees then decided to present the written grievance to Johnson. A copy of that grievance was introduced into evidence as General Counsel's Exhibit 2. As will be explained later, a first page and some typewritten material were added to the document. Taylor's signature appears on page 6 of the grievance just before the last paragraph on that page which is entitled "Additional Comments."

#### The Events About 1 p.m. on April 23, 1979

Near the end of the lunch hour on April 23, 1979, the written grievance was presented by Taylor to Johnson. This took place in the presence of employees Louis Chuck Henry, Barbara McGhee, Beverly Kneece, and Janice Brown. The group met in the front room of the Diamond Head Tutorial Center. Taylor read the handwritten grievance to Johnson at that time.

Taylor testified, "Well, she was laughing throughout the reading, and at the end she had one big laugh, and she jumped up and pointed her finger at me and singled me out and said, 'You're the one who's doing this because you want to be the coordinator, and you'll never be a coordinator.'"

Taylor responded that he liked Johnson, and that he did not have the proper qualifications to be a coordinator. Taylor unsuccessfully attempted to hand the written grievance to Johnson. She told him that she would wait until a hearing was held to tell her side. She said, "We'll see who gets the last laugh."

Taylor retained the document in his possession. Before he left the Diamond Head center to go to the Avalon-

Carver Community Center, Taylor advised the employees that he was adding a title page to the grievance. He also informed them that he was adding a copy of some typewritten material which Johnson had given to the staff. The title page on the grievance is page 1 and it is handwritten. It states, "Operation Freshstart." The typewritten material covers pages 8 through 12 of General Counsel's Exhibit 2. The typewritten material purports to be an example of one of the matters about which the employees were complaining in the grievance.

It is not necessary here to quote verbatim from General Counsel's Exhibit 2. The document, of course, is part of the record, and it may be studied by those who have a need to do so.

The handwritten portions of the document are strongly worded, and the tone is harsh. The subject matter pertains to the employees' complaints regarding the performance and the attitude of their supervisor, Johnson. The document is sharply critical of what those employees perceived to be the deficiencies in their supervisor's performance, and what those employees believed to be their supervisor's attitude towards the employees and towards the work to be accomplished at the Diamond Head Tutorial Center.

Without deciding whether or not the employees' grievance has or lacks any merit, I find that General Counsel's Exhibit 2 constitutes a grievance of the Respondent's employees.

#### The Meeting Between Whittaker and Taylor on April 23, 1979

After the meeting described above with Johnson, Taylor took the grievance to Whittaker at the Avalon-Carver Community Center. Taylor met with Whittaker in Whittaker's office. No one else was present.

Taylor told Whittaker that they had written a grievance about Johnson. Taylor said that the grievance had been discussed with Johnson, and that they had attempted to resolve the grievance at the Diamond Head Tutorial Center before bringing the grievance to Whittaker. Taylor then gave the document to Whittaker.

Whittaker told Taylor that he was doing the right thing. Whittaker also asked Taylor who was involved. Taylor replied Louis Chuck Henry, Barbara McGhee, and Beverly Kneece, and at that point Whittaker interrupted Taylor before he had finished. Whittaker told Taylor that he was glad that they were not writing something about him. Whittaker said that he was going to have the grievance typed, and Whittaker told Taylor to tell the employees at the Diamond Head Tutorial Center that Whittaker was going to take action on this matter.

Taylor informed Whittaker that Johnson did not want to discuss the grievance, and that Johnson had said that she would wait and tell her side at the hearing. Whittaker asked Taylor if he wanted to be the coordinator of the program. Taylor replied that he did not because Taylor did not feel that he had the qualifications. Taylor expressed his opinion that the type of person needed for the coordinator's position was "an individual that had sociological expertise as well as expertise in the educational

process." Taylor further testified, "[H]e did ask me to tell everyone that he would take action on the matter." Whittaker kept the grievance, and Taylor returned to the Diamond Head Tutorial Center.

#### The Subsequent Events that Day

Following the discussion described above between Whittaker and Taylor, Taylor returned to the Diamond Head Tutorial Center. Taylor overheard Johnson say something to the effect, "I've been nice to all of you, and now I'm going to work you to death." Johnson was in her office at the time that Taylor overheard the foregoing remarks. Taylor was about 8 to 10 feet away from her at a table near the doorway in the front room of the Diamond Head Tutorial center.

#### The Telephone Conversation Between Whittaker and Taylor on April 25, 1979

Because a couple of days had passed since the written grievance had been presented first to Johnson and then to Whittaker, the employees expressed a desire to Taylor to find out what was going to happen. Therefore, Taylor telephoned Whittaker on April 25, 1979. Taylor asked Whittaker what was going to be done, and he said that the other staff members wanted to know. Whittaker responded that Taylor should tell everyone to report at 1 o'clock on Thursday, April 26, 1979, to the Avalon-Carver Community Center. In accordance with Whittaker's instructions, Taylor advised the other staff members of the scheduled meeting.

#### The Meeting Among Whittaker and the Employees on April 26, 1979

A staff meeting was held in the conference room at the Avalon-Carver Community Center at 1 p.m. on April 26, 1979. Present were: Whittaker, Taylor, Louis Chuck Henry, Barbara McGhee, Beverly Kneece, Patricia Mosby, and Janice Brown.

Whittaker informed the group "that Florine Johnson would not be there because he wanted us to get all our complaints out without her presence." Whittaker then looked at Taylor "with a frown, kind of angry-looking" and said that he had heard some things that Taylor had been doing at the Diamond Head Tutorial Project "and that if he had been the coordinator he would have fired me."

Whittaker next pointed his finger at Kneece, and he asked her if she had signed the paper. Kneece replied "yes."

Whittaker then asked everyone at the meeting what the problems were that they wanted to present. Louis Chuck Henry responded that there were a lot of good things about Johnson, but he added that some things just did not work out, and "communication was a problem." Kneece also said that they were not able to communicate with Johnson.

Mosby testified, "I said that I had only been on the job maybe a month and a half and that I had no grievance toward anyone, and I didn't wish to make any further comments because I had merely just started learning my employees and the people I was working with."

Whittaker said that he had read the grievance and that he knew there were a couple of things stated therein with which Johnson had problems. Whittaker also said that he was going to work with Johnson on those problems. He said that he knew that one problem was communication because he had some difficulty in communicating with her.

Whittaker then asked Janice Brown what she thought. Brown said that she felt that there were no problems at all at the Diamond Head Tutorial Project.

Taylor made some comments regarding his view of the way Johnson had reacted since the grievance was filed. Taylor said that Johnson was requiring that the employees stay until 5 p.m. each day, and that she had made some comments regarding Taylor's religious beliefs and his education.

Just before the meeting ended, Whittaker told Taylor that he wanted Taylor to remain because there were some things he wanted to discuss with Taylor about Taylor's job performance. Whittaker then dismissed the other employees and instructed them to return to the Diamond Head Tutorial Project.

#### The Conversation Between Whittaker and Taylor Following the Meeting on April 26, 1979

Whittaker and Taylor remained in the conference room at the Avalon-Carver Community Center after the other persons had departed.

Whittaker commented that he had known for months about things which Taylor had been doing at the Diamond Head Tutorial Project and at the school. Whittaker expressed his view that he did not like those things. Whittaker inquired about the teachers with whom Taylor had worked. Specifically, Whittaker asked about Adams. Taylor explained that Johnson had earlier determined that Adams and Taylor had a "personality conflict." Taylor continued by stating that Adams had told him every couple of weeks that Taylor was a good tutor; however, "she wanted me to holler at the kids." Taylor stated that he had told Adams that discipline was not a part of his duties.

Whittaker then asked Taylor about his work with Mayfield. Taylor answered that Johnson had asked him if he would work with Mayfield after Johnson had advised him of her belief that Mayfield had undergone a certain type of operation which results in the change of the gender of a person. Taylor told Whittaker that he had replied, "Well, that didn't make any difference to me because my main concern was with the kids in the classroom, and any other problems an individual had I wouldn't be concerned about."

Taylor related to Whittaker that, when teacher's aide Naomi Woodson was in Mayfield's classroom, Taylor and Mayfield "couldn't seem to get along." On other occasions, Taylor said that "we got along fine."

Whittaker then asked Taylor what had happened when Taylor had sent some children home early one day at the Diamond Head Tutorial Project. Taylor testified:

Well, I told him that Florine Johnson and Louis Chuck Henry had been into a very heated argu-

ment; they had their fists balled up; and it went on for forty-five minutes, in front of the kids and the staff. It started from inside the Diamond Head and even went out into the front yard. Chuck Henry is screaming and using vulgar terms at her. And it was just so much tension there that when I came to work the next day Florine Johnson was still in that terrible mood, and I had—

It was on a Friday, and I had—this was a day that had been reserved, if the tutor wanted to, to use as a day to have educational games, as more or less of a change of pace for the week, for the children. So, I had set up a math game for the kids, math bingo and so forth. And what I would usually do, I would put one kid in charge, to give them responsibility in doing something on their own.

And I had come downstairs to see about getting a book for one of the little girls who stole books all the time from our center, so I had talked her into letting me give her a book each day to take home instead of just taking any books, and I asked someone for a light while I was down there for a brief minute.

And Florine Johnson said, in kind of an angry voice, "You're not supposed to be leaving the kids upstairs unattended."

And I said, "Well, I'm going right back up."

But she screamed again, "You aren't supposed to be leaving those kids unattended," or something like that.

I said, "Well, I can't see what the problem is. When I had kids upstairs that I was tutoring and I had kids downstairs that I was tutoring at the same time, there was no problem about me going back and forth at that time."

And we just got into an argument; so I just went back upstairs and told the kids just to go home, and I just left, myself. I said, "I've had enough of that. That's the second day something like that's going on." I didn't want to be bothered with all that hostility.

Taylor said that the foregoing incident had taken place near the end of February 1979.

Whittaker then told Taylor that "because of these reasons I was going to be terminated, and that he would pay me through April 30th even though it was the 26th."

Taylor asked Whittaker for a CETA termination form which Taylor could take to the unemployment office. Whittaker could not locate a form at that time, so he told Taylor that he would have a form when Taylor came in on Monday, April 30, 1979. Whittaker also asked Taylor if there was any reason for Taylor to return to the Diamond Head Tutorial Project. Taylor replied "no."

Prior to his termination on that date, no disciplinary action had been taken by the Respondent against Taylor.

#### The Admissions Made After the Filing of the Unemployment Claim

On April 30, 1979, Taylor filed for unemployment insurance benefits at the Hollywood office of the Employ-

ment Development Department of the State of California. On that occasion Taylor met with an agent of that department who was identified only by his last name of West.

West advised Taylor that West would contact Taylor's employer. There is some hearsay testimony in the record as to what Taylor said that West said that Whittaker had said. However, rather than rely upon that testimony, I shall instead rely upon certain statements made earlier by Whittaker in his pretrial affidavit. This matter has been previously discussed in section 2 herein. In particular, I find that Whittaker did make the admissions against the Respondent's interest to West that "Taylor was a disruptive force among the staff," and that Taylor's grievance was "the straw that broke the camel's back." *Alvin J. Bart and Co., Inc.*, 236 NLRB 242 (1978).

Taylor did receive unemployment insurance benefits. The initial decision awarding him those benefits was appealed by the Respondent. The Respondent's appeal of that decision was subsequently dismissed. General Counsel's Exhibit 3 shows the amount of money received by Taylor in 1979 as unemployment compensation payments.

#### Conclusions

A threshold issue presented in this case is whether the activities engaged in by Taylor prior to his termination by the Respondent are the type of activities which are protected by the Act.

Without repeating here the findings of fact set forth previously herein, I conclude that Taylor was engaged in protected concerted activities with other employees in the preparation and in the presentation of a grievance to the Respondent. Other employees of the Respondent actively participated in discussing the subject matter of the grievance, in preparing the written grievance, and in presenting the grievance to the Respondent's supervisors.

The fact that the subject matter of the grievance was sharply critical of the performance and the attitude of one of the Respondent's supervisors does not remove the presentation of the grievance from the protection of the Act. See the Board's decision in *Dreis & Krump Manufacturing, Inc.*, 221 NLRB 309 (1975), and especially the concurring opinion of Board Member Penello, who stated at 310:

It is well established that the identity, capabilities, and quality of supervision, at least where, as here, the quality of that supervision has an impact upon the employees' job interest and their ability to perform the task for which they were hired, are the legitimate concern of employees.<sup>6</sup>

<sup>6</sup> *Leslie Metal Arts Company, Inc.*, 208 NLRB 323 (1974), enf'd. 509 F.2d 811 (C.A. 6, 1975); *Cubit Systems Corporation*, 194 NLRB 622 (1971); *Guernsey-Muskingum Electric Cooperative, Inc.*, 124 NLRB 618 (1959), enf'd. 285 F.2d 8 (C.A. 6, 1960); *Okla-Inn, d/b/a Holiday Inn of Henryetta*, 198 NLRB 410 (1972); *Plastilite Corporation*, 153 NLRB 180 (1965), enf'd. 375 F.2d 343 (C.A. 8, 1967).

It should be made clear that the employees' grievance pertaining to Johnson may have some merit, or it may be

totally without any merit. That question is not before me. A resolution of the issues raised by the pleadings in this case does not depend upon whether the employees' grievance has any merit. Thus, no decision is being made with regard to the criticisms of Johnson which are alleged by the employees in General Counsel's Exhibit 2.

Instead, the issue presented in this case pertains to whether the Respondent discharged Taylor on April 26, 1979, because Taylor had engaged in protected concerted activities with other employees in presenting a grievance to the Respondent.

In summary, the General Counsel urges that it was Taylor's protected concerted activities with other employees which led the Respondent to decide to terminate Taylor. The General Counsel argues that the reasons given by the Respondent for discharging Taylor are "merely pretextual." (See especially pp. 12-14 of the brief filed by counsel for the General Counsel for a more complete presentation of his argument.)

In summary, the Respondent urges that there was reasonable and sufficient cause for the Respondent to terminate Taylor, and that Taylor's termination was effected consistent with the Respondent's personnel policy and practice. The Respondent argues that Taylor "was unable to adjust to the work situation as manifest by his continued and consistent unsatisfactory performance over a period of approximately seven (7) months." It is the Respondent's position that "[t]he Center ultimately had no choice but to terminate him from the tutorial program and his status as a trainee due to his unsatisfactory performance." (See especially pp. 3-9 of the brief filed by the representative of the Respondent for a more complete presentation of his argument.)

The evidence shows that Taylor's job performance for the Respondent was not perfect. Taylor did not always meet the Respondent's expectations and desires for a tutor. Nevertheless, the credited evidence does show that Taylor was able to improve in being punctual, and Taylor enjoyed a better working relationship with the last teacher with whom he worked, Montgomery, than Taylor had with Adams or Mayfield. More importantly, the evidence shows that the Respondent tolerated Taylor's deficiencies in his performance until the time that he filed a grievance. After the employees' grievance was presented to the Respondent, Taylor's termination followed just a few days later. Thus, the Respondent's past tolerance of any deficiencies in Taylor's work and the timing of his termination so soon after he had presented the employees' grievance are factors to be considered.

While the statements made by Whittaker to the Employment Development Department agent, West, are after-the-fact statements, those admissions take on added significance because Whittaker was the Respondent's agent who had actually terminated Taylor. It will be remembered from the findings of fact that Whittaker said that "Taylor was a disruptive force among the staff." In addition, Whittaker described Taylor's grievance as being "the straw that broke the camel's back." While those statements were made after the termination of Taylor, they are revealing of the true reasons for Taylor's termination.

After considering the foregoing matters, I conclude that the reasons advanced by the Respondent for the termination of Taylor are pretextual reasons, and that Taylor's past shortcomings in his job performance were not the true reasons for his termination. Instead, I conclude that a preponderance of the evidence establishes that the Respondent terminated Taylor on April 26, 1979, because he had engaged in protected concerted activities with other employees. Accordingly, I further conclude that the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by the Act, and that the Respondent has thereby violated Section 8(a)(1) of the Act. *Fall River Savings Bank*, 247 NLRB 631 (1980).

With regard to the post-discharge efforts to resolve the issues pertaining to Taylor's termination through the Respondent's internal grievance procedures, I conclude that those procedures do not preclude Taylor's pursuit of his remedies under the National Labor Relations Act, especially where Taylor has been fired because of his presentation of a grievance of Respondent's employees. (See, e.g., Resp. Exhs. 3, 4, 5, and 6.)

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by terminating Lloyd E. Taylor on April 26, 1979, because he had engaged in protected concerted activities.
3. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Since I have found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend to the Board that the Respondent be ordered to cease and desist from engaging in those unfair labor practices.

I shall also recommend to the Board that the Respondent take certain affirmative action in order to effectuate the policies of the Act. Such affirmative action will include an offer of immediate reinstatement to Taylor. In its decision in *Trustees of Boston University*, 224 NLRB 1385 (1976), the Board stated:

It is a significant consideration that other employees be made aware, through the discriminatee's return to his or her former job, that their rights to engage in concerted activity are protected by the Act. Finally, despite the difficulties, we believe it is incumbent upon the employer, in order to comply with our Order, and the discriminatee, in order to fulfill the legitimate job requirements of the position to which he or she is to be reinstated, to attempt to work together harmoniously and forget past animosity.



In addition, I shall recommend to the Board that Taylor be made whole for his losses which have resulted from the Respondent's action against him. Backpay for Taylor, together with interest on such backpay amounts, will be computed in accordance with the Board's decisions in *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977). In this connection, see also the Board's decision in *Olympic Medical Corporation*, 250 NLRB 146 (1980), where the Board stated that it would adhere to the formula set forth in its *Florida Steel* decision.

In accordance with the Board's decision in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), I shall recommend to the Board a narrowly drafted cease-and-desist order, rather than a broadly drafted one.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>1</sup>

The Respondent, Avalon-Carver Community Center, Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Terminating an employee because the employee has engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary in order to effectuate the policies of the Act:

(a) Offer Lloyd E. Taylor immediate and full reinstatement to his former position of employment or, if that job no longer exists, to a substantially equivalent position of employment, without the loss of his seniority or any other rights and privileges.

(b) Make whole Lloyd E. Taylor for his loss of earnings, with appropriate interest thereon, which has resulted from his termination by the Respondent. Such backpay and interest are to be computed as set forth in "The Remedy" section of this Decision.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all

payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Los Angeles, California, main office and at all of its other offices copies of the attached notice marked "Appendix."<sup>2</sup> Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

<sup>2</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

WE WILL NOT terminate an employee because the employee has engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Lloyd E. Taylor immediate and full reinstatement to his former position of employment or, if that job no longer exists, to a substantially equivalent position of employment, without the loss of his seniority or any other rights and privileges.

WE WILL pay to Lloyd E. Taylor the amount of his loss of earnings, with appropriate interest thereon, which has resulted from the termination of him.

AVALON-CARVER COMMUNITY CENTER

<sup>1</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.